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A CASH-OUT BREAKTHROUGH IN DELAWARE JUDICIAL MERGER REGULATION: *WEINBERGER V.* *UOP, INC.*

IN 1975 The Signal Companies, Inc. acquired 50.5% of the common stock of UOP, Inc. Over the next two years Signal placed its employees on the board of directors and in management positions of UOP. In 1978 Signal became interested in the possibility of acquiring the remaining shares of UOP's stock. Two directors of Signal, while sitting on the UOP board, used UOP documents to prepare a feasibility study exclusively for the use of Signal to ascertain the viability of such an acquisition. On the basis of this study Signal rapidly proposed and consummated a cash-out merger¹ eliminating the minority shareholders' interests in UOP. A number of the minority shareholders brought a class action suit alleging that the majority shareholders had breached the fiduciary duty they owed to the minority shareholders and that the tender offer was for a grossly inadequate price per share. The Delaware Chancery Court relied on standards enunciated by the Delaware Supreme Court in *Singer v. Magnavox Co.*² to conclude that no breach of fiduciary duty had occurred and that the merger had been effectuated for a valid business purpose. The plaintiffs appealed the decision to the Delaware Supreme Court. *Held, reversed*: Although an independent business purpose is not required to support a cash-out merger, the majority shareholders breached their fiduciary duty to minority shareholders by failing to negotiate fairly and failing to offer a fair price for the acquired shares. *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

I. MERGER RESTRICTIONS PRIOR TO *SINGER V. MAGNAVOX CO.*

Until recent years the evolution of Delaware corporate law³ with respect

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1. "Cash-out merger" or "freeze-out" refers to the use of corporate control vested in the statutory majority of shareholders or the board of directors to eliminate minority shareholders from the enterprise or to reduce to relative insignificance their voting power or claims on corporate assets. It implies a purpose to force upon the minority shareholders a change which is not incidental to any other business goal of the corporation.

BLACK'S LAW DICTIONARY 599 (5th ed. 1979); see Borden, *Going Private—Old Tort, New Tort or No Tort?*, 49 N.Y.U. L. REV. 987, 988-89 (1974).

2. 380 A.2d 969 (Del. 1977).

3. The Delaware Supreme Court and Court of Chancery historically influence the judicial interpretation of other major industrial states. The highly favorable incorporation laws in Delaware attract many major corporations to the state. As a result the Delaware

to cash-out mergers was relatively slow. Initially the common law required stockholder unanimity for corporate structural modifications.⁴ This requirement slowly gave way in the face of statutory⁵ and judicial⁶ liberalization in major industrial states during the first third of the twentieth century, resulting in limited corporate freedom to reorganize or dissolve without unanimous stockholder consent.⁷ *Guth v. Loft, Inc.*⁸ is indicative of the state of Delaware law in 1939.⁹ In *Guth* the Delaware Chancery Court construed the duties that a director owes to his employer-corporation and its stockholders.¹⁰ Loft was a corporation engaged in the manufacture and sale of candies, syrups, and beverages. Guth, while a director of Loft, received and seized an opportunity to acquire the trademark and patented formula of the National Pepsi-Cola Company. A portion of the acquisition cost was paid with Loft funds, and most of the subsequent de-

courts address the major corporate law issues from a stance of expertise. Weiss, *The Law of Take Out Mergers: A Historical Perspective*, 56 N.Y.U. L. REV. 624, 624-26 (1981).

4. This requirement led to rule by the minority, since dissenting shareholders could deny the majority the opportunity to effect material change in the corporate structure. *Id.* at 627; see *Mason v. Pewabic Mining Co.*, 133 U.S. 50 (1890) (corporate life extension by asset transfer prevented when one shareholder objected); see also *In re Timmis*, 200 N.Y. 177, 93 N.E. 522, 524 (1910) (strike suits by shareholders who purchased their shares after disfavored transaction was announced prevented consummation of merger). For a comprehensive review of the developmental stages that lead to *Weinberger*, see Weiss, *supra* note 3.

5. See DEL. CODE ANN. tit. 8 (1975 & Supp. 1982); N.Y. BUS. CORP. LAW § 901(a)(1) (McKinney 1963); 1927 Ohio Laws 35, §§ 8623-8667; Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297, 299 (1974); Hill, *Consolidation of Corporations by Sale of Assets and Distribution of Shares*, 19 CALIF. L. REV. 349, 362-64 (1931); Lattin, *Equitable Limitations on Statutory or Charter Powers Given to Majority Stockholders*, 30 MICH. L. REV. 645, 645-46 (1932); Comment, *Statutory Merger and Consolidation of Corporations*, 45 YALE L.J. 105, 112-13 (1935).

6. See, e.g., *Beling v. American Tobacco Co.*, 72 N.J. Eq. 32, 65 A. 725, 728 (Ch. 1907) (stock for stock merger first allowed under New Jersey statute); *Small v. Sullivan*, 245 N.Y. 343, 346-48, 157 N.E. 261, 263-64 (1927) (corporate consolidation under then New York law); Weiss, *supra* note 3, at 636-37 (cash mergers allowed but courts prevented unfair exchanges of stock-plus-appraisal). But see *Outwater v. Public Serv. Corp.*, 103 N.J. Eq. 461, 143 A. 729, 730 (Ch. 1928) (merger that amounted to a forced sale prevented).

7. Hill, *supra* note 5, at 355-56; Comment, *supra* note 5, at 112-13.

8. 23 Del. Ch. 255, 5 A.2d 503 (Sup. Ct. 1939).

9. Cf. *Alpren v. Consolidated Edison Co.*, 168 Misc. 381, 5 N.Y.S.2d 254 (Sup. Ct. 1938) (representative example of New York law in same period). In *Alpren* the plaintiff brought a constitutional challenge against a New York statute that permitted gas and electric companies to merge with subsidiaries in which they held a 95% or greater interest. Act of May 28, 1936, ch. 778, § 1, 1936 N.Y. Laws 1658 (current version at N.Y. BUS. CORP. LAW § 901(a)(1) (McKinney 1963)). Prior to the enactment of the statute New York law generally required that the merging corporation own all the stock of the merged corporation. Stock Corporation Law, ch. 787, § 85, 1923 N.Y. Laws 1377, 1403 (current version at N.Y. BUS. CORP. LAW § 905(a) (McKinney 1963)). The court rejected the plaintiff's contention and held that the amendment of the merger requirements was a matter of public policy within the province of the legislature to control. 5 N.Y.S.2d at 256. The court emphasized that the shareholder had no constitutional prerogative to insist that the limits on corporate activity remain unchanged. *Id.* at 257. The New York Court of Appeals subsequently made it clear that the minority shareholder had only "one real right" to receive the cash value of his interest upon merger. *Beloff v. Consolidated Edison Co.*, 300 N.Y. 11, 87 N.E.2d 561, 564 (1949). The shareholder had no right to go along into the merger or to share in its future benefits. *Id.* at 565.

10. 5 A.2d at 510.

velopment costs were also financed by Loft. Guth nevertheless claimed that the Pepsi-Cola property and stock that he had acquired were his individually and not Loft's. The Delaware Supreme Court affirmed the chancellor's finding to the contrary.¹¹ As a preliminary matter, the court held that corporate directors stand in a fiduciary relationship to the corporation and its shareholders.¹² The court stated that this relationship precluded a director from seizing for personal gain business opportunities presented to the corporation.¹³ The court conceded that corporate officers and directors are free to engage in an independent, competitive business, but only so long as that activity does not violate a "legal or moral duty" implicit in the fiduciary relation that exists between the corporation and the officer or director.¹⁴ The fiduciary duty test established in *Guth* asked whether, based on all the facts and circumstances, the officer or director had acted as a conscientious representative of the entire corporate entity.¹⁵ This test, when coupled with the "moral duty" requirement, gave courts broad discretion in assessing the fairness of a challenged action regardless of whether the action was within the letter of the statute.¹⁶ The court found that Guth had violated these standards in appropriating the Pepsi-Cola opportunity to himself by secretly using the money and facilities of Loft, which were committed to his protection as a director.¹⁷ Guth was therefore ordered to disgorge all the gains arising from his breach of duty.¹⁸ The *Guth* decision is crucial to all later fiduciary duty cases because it established both the general nature of the duty and the remedy for breach of that duty.

Although *Guth* purported to give courts broad discretion in determining

11. *Id.* at 515.

12. *Id.* at 510; *see also* *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928) (coadventurers "subject to fiduciary duties akin to those of partners"); *Bailey v. Jacobs*, 325 Pa. 187, 189 A. 320, 324 (1937) (directors and officers have fiduciary relationship with shareholders).

13. 5 A.2d at 513-15; *see also* *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 412 P.2d 47, 57 (1966) (director or officer may not seize business opportunity presented to corporation); *Blaustein v. Pan Am. Petroleum & Transp. Co.*, 174 Misc. 601, 21 N.Y.S.2d 651, 722 (Sup. Ct. 1940) (subsidiary entitled to profits from business opportunity belonging to subsidiary that was seized by parent).

14. 5 A.2d at 514.

15. *Id.* at 511-12; *cf.* *MacIsaac v. Pozzo*, 81 Cal. 2d 278, 183 P.2d 910, 914 (1947) (test is whether opportunity is reasonably the director's); *Durfee v. Durfee & Canning, Inc.*, 323 Mass. 187, 80 N.E.2d 522, 529 (1948) (standard is what is fair and equitable).

16. 5 A.2d at 514.

17. *Id.* at 515. Similarly, Securities and Exchange Commission rule 10b-5 protects the investor from unfair treatment by those with inside information. *See* 17 C.F.R. § 240.10b-5 (1983). The United States Supreme Court in *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), left the remedy for breaches of fiduciary duty to the states. *Id.* at 478; *see Note, Suits for Breach of Fiduciary Duty Under Rule 10b-5 After Santa Fe Industries, Inc. v. Green*, 91 HARV. L. REV. 1874, 1884-98 (1978).

18. 5 A.2d at 508; *see also* *Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 504-06 (Del. 1981) (expanded remedies available to the cashed-out minority).

the fairness of a corporate transaction, courts have traditionally been reluctant to substitute their business judgment for that of corporate directors.¹⁹ In *Gottlieb v. Heyden Chemical Corp.*²⁰ the Delaware Supreme Court reviewed the actions of corporate directors who had granted themselves stock options with rights to purchase below market price. The Delaware Supreme Court firmly placed the burden of proving the "utmost good faith and the most scrupulous inherent fairness of the bargain"²¹ on directors who act both on their own behalf and as representatives of the corporation.²² The court stated that if the shareholders have ratified the challenged actions, however, it would defer to the directors' business judgment if reasonable men acting in good faith could differ as to the result.²³

This rather restricted standard of review was broadened considerably in *Sterling v. Mayflower Hotel Corp.*²⁴ In *Sterling* a group of minority shareholders of Mayflower brought suit to enjoin its merger into its parent corporation, alleging that the price offered for their shares was inadequate. The Delaware Supreme Court began by reiterating its holding in *Gottlieb* that the burden of establishing the "entire fairness" of the transaction rested on the parent corporation since it stood on both sides of the transaction.²⁵ The court stated that under this standard "all relevant value factors must be considered in arriving at a fair value" for the minority's shares.²⁶ After examining the entire transaction the court concluded that the minority shareholders had received fair value for their investment under the Delaware merger statute.²⁷

19. This reluctance stems in large part from the perceived difficulty in balancing the many variables that necessarily arise in making any business decision. See *Sterling v. Mayflower Hotel Corp.*, 33 Del. Ch. 293, 93 A.2d 107, 115 (Sup. Ct. 1952); *Tri-Continental Corp. v. Battye*, 31 Del. Ch. 523, 74 A.2d 71, 76-77 (Sup. Ct. 1950); *In re General Realty & Utils. Corp.*, 29 Del. Ch. 480, 52 A.2d 6, 15 (Ch. 1947).

20. 33 Del. Ch. 177, 91 A.2d 57 (Sup. Ct. 1952).

21. 91 A.2d at 58; see also *In re Hammond*, 98 F.2d 703, 705 (2d Cir. 1938) (officer or director is fiduciary); *Bainbridge v. Stoner*, 16 Cal. 2d 423, 106 P.2d 423, 426 (1940) (director acts in fiduciary capacity); *Eliasberg v. Standard Oil Co.*, 23 N.J. Super. 431, 92 A.2d 862, 867-68 (Super. Ct. Ch. Div. 1952) (quoting *Gottlieb* proof of fairness requirement); *Forker v. Brown*, 10 Misc. 161, 30 N.Y.S. 827, 829 (1894) (directors are fiduciaries).

22. 91 A.2d at 58; cf. *Holthusen v. Edward G. Budd Mfg. Co.*, 53 F. Supp. 488, 490-91 (E.D. Pa. 1943) (burden is on minority shareholders to show overreaching by majority in order to prevent "surge of litigation").

23. 91 A.2d at 58-59; see also *Eliasberg v. Standard Oil Co.*, 23 N.J. Super. 431, 92 A.2d 862, 867-68 (Super. Ct. Ch. Div. 1952) (quoting *Gottlieb* business judgment standard and wholly approving its rationale).

24. 33 Del. Ch. 293, 93 A.2d 107 (Sup. Ct. 1952).

25. 93 A.2d at 110.

26. *Id.* at 114.

27. *Id.* at 116-17; cf. *Cole v. National Cash Credit Ass'n*, 18 Del. Ch. 47, 156 A. 183, 190 (Ch. 1931) (dissenting stockholder must prove abuse of discretion, breach of trust, or maladministration on part of management in order to justify enjoining merger). In *David J. Greene & Co. v. Schenley Indus., Inc.*, 281 A.2d 30 (Del. Ch. 1971), the court held that the modern version of the Delaware long-form merger statute, DEL. CODE ANN. tit. 8, § 251

II. *SINGER V. MAGNAVOX CO. AND TANZER V. INTERNATIONAL GENERAL INDUSTRIES, INC.*

The Delaware law of fiduciary duty between majority and minority stockholders before 1977 did not inquire into the majority shareholders' purposes under long²⁸ or short²⁹ form mergers. The law required only that cashed-out minorities receive reasonable compensation for the elimination of their interests in the merged corporation.³⁰ The Delaware Supreme Court altered that requirement in *Singer v. Magnavox Co.*³¹ In 1974 North American Phillips Corporation acquired 84.1% of Magnavox Company through a tender offer made by one of its wholly owned subsidiaries. Thereafter North American created a second tier subsidiary in order to acquire complete control of Magnavox by forcing the merger of Magnavox into the subsidiary. North American, as majority shareholder of Magnavox,³² voted its shares in favor of a merger under which the Magnavox minority would receive nine dollars per share or an amount determined by statutory appraisal.³³ At the time of the merger the Magnavox stock had a book value of \$10.16 per share. The Delaware Supreme Court conceded that North American had acted completely within statutory parameters in effectuating the merger, but held that mere statutory compliance was inadequate.³⁴ The court held that the defendants, as directors and fellow shareholders of the minority, must also satisfy

(1975), authorized cash-out mergers although the statute contained no special protection for minority shareholders. *Id.* at 35. The analogous short-form merger statute, DEL. CODE ANN. tit. 8, § 253 (1967), was upheld in *Stauffer v. Standard Brands, Inc.*, 41 Del. Ch. 7, 187 A.2d 78 (Sup. Ct. 1962).

28. DEL. CODE ANN. tit. 8, § 251 (1975 & Supp. 1982), entitled "Merger or consolidation of domestic corporations," sets forth the requirements for merger or consolidation of two or more corporations created under the laws of Delaware. The statute requires that the board of directors and the stockholders of each corporation approve all aspects of the transaction, including the form of the resulting entity. *Id.*

29. *Id.* § 253 (1975 & Supp. 1982), entitled "Merger of parent corporation and subsidiary or subsidiaries," allows a parent corporation owning 90% or more of each class of outstanding stock of a subsidiary to employ an abbreviated (short-form) merger procedure, thus simplifying the consummation of a parent-subsidiary merger. The short-form merger eliminates stockholder approval requirements of § 251 and, in cases of 100% ownership, the filing of a certificate of ownership and merger with the secretary of state. *Id.*

30. *Tanzer v. International Gen. Indus., Inc.*, 379 A.2d 1121, 1124 (Del. 1977); see also Weiss, *supra* note 3, at 658-91 (discussing impact of *Singer* on all previous fiduciary duty inquiries); Note, *Singer v. Magnavox and Cash Take-Out Mergers*, 64 VA. L. REV. 1101, 1104-05 (1978) (court rejected "entire fairness" standard and instead held that shareholder has a "right in his shares").

31. 380 A.2d 969 (Del. 1977).

32. DEL. CODE ANN. tit. 8, § 251(c) (1975) requires only majority stockholders' approval of a proposed merger.

33. *Id.* § 262 (1975) (as amended 1976). The minority under either alternative would lose all participation in the Magnavox enterprise and would therefore be cashed-out. The minority shareholders who did not follow the statutory appraisal option ultimately sued North American, its subsidiaries, Magnavox, and the board of directors of Magnavox. The plaintiffs alleged that the merger did not satisfy the business purpose rule, that the price offered by North American was grossly unfair, and that the defendants had breached a fiduciary duty toward the minority by offering and approving the terms of the merger.

34. 380 A.2d at 975.

the fiduciary duty of "honesty, loyalty, good faith and fairness" that they owed the corporation in dealings with it.³⁵ The court stated that this additional requirement was intended to balance the shareholder's interest in protecting his investment and voting his shares as he desires with a public policy that favors mergers.³⁶ The court concluded that a merger for the sole purpose of eliminating the minority shareholders was inconsistent with the fiduciary standard it had enunciated and constituted an "abuse of the corporate process."³⁷ The *Singer* court thus strengthened the business judgment rule enunciated in *Gottlieb* by employing fiduciary duty concepts from nonmerger cases³⁸ and extended the duty of majority shareholders established in *Sterling*.³⁹

The Delaware Supreme Court clarified *Singer* in *Tanzer v. International General Industries, Inc.*⁴⁰ by recognizing a shareholder's right to use his ownership power for his own best interest, including voting to merge with another entity.⁴¹ *Tanzer* thus diminished the minority's protection against a cash-out by acknowledging the value of mergers to the business community. *Tanzer* also held, however, that a merger solely for the purpose of eliminating the minority was impermissible.⁴² The majority must also show a present, bona fide business reason for the merger in order to obtain judicial approval of that merger.⁴³ Moreover, the entire transaction must

35. *Id.* at 977 (citing *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971); *Kaplan v. Fenton*, 278 A.2d 834 (Del. 1971); *Dolese Bros. Co. v. Brown*, 39 Del. Ch. 1, 157 A.2d 784 (Sup. Ct. 1960); *Johnston v. Greene*, 35 Del. Ch. 479, 121 A.2d 919 (Sup. Ct. 1956); *Italo-Petroleum Corp. of America v. Hannigan*, 40 Del. 534, 14 A.2d 401 (1940); *Guth v. Loft*, 23 Del. Ch. 255, 5 A.2d 503 (Sup. Ct. 1939)).

36. 380 A.2d at 978 (quoting E. FOLK, THE DELAWARE GENERAL CORPORATION LAW § 251, at 332 (1972)); see also Note, *supra* note 30, at 1104-05 (shareholder right to investment form limited by balancing against greater business purpose).

37. 380 A.2d at 980. The court viewed this conclusion as a natural outgrowth of its decision in *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 5 A.2d 503, 511 (Sup. Ct. 1939).

38. 380 A.2d at 979; see *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971); *Condec Corp. v. Lunkenheimer Co.*, 43 Del. Ch. 353, 230 A.2d 769, 775 (Ch. 1967); *Bennett v. Brevil Petroleum Corp.*, 34 Del. Ch. 6, 99 A.2d 236, 239 (Ch. 1953). The above cases were cited by the *Singer* court, although none involved fiduciary standards in the context of mergers. The court also cited *Pennsylvania Mut. Fund, Inc. v. Todhunter Int'l, Inc.*, No. 75-4845 (Del. Ch. Aug. 5, 1975), reprinted in 1 DEL. J. CORP. L. 229 (1975). 380 A.2d at 979 n.10. *Todhunter* denied a merger where use of majority control to cash out the minority was the only business purpose. 1 DEL. J. CORP. L. at 229-30.

39. 380 A.2d at 979-80. At least one writer believes *Singer* strongly protected minority shareholder rights because the Delaware Supreme Court wanted to demonstrate its strength and avoid federal corporation statutes. See Note, *supra* note 30, at 1111-12.

40. 379 A.2d 1121 (Del. 1977). The plaintiffs in *Tanzer* were shareholders of Kliklok Corporation. The defendants were International General Industries, Inc. (IGI), which owned 81% of Kliklok's stock, and IGI's directors. IGI had created a subsidiary that it intended to merge with Kliklok. Under the terms of the merger the minority shareholders of Kliklok would be cashed out and IGI would obtain complete ownership of Kliklok. The plaintiffs sought to enjoin the merger, arguing that its sole purpose was to serve the interests of the parent, IGI. The chancery court declined to grant the injunction, and the plaintiffs appealed.

41. *Id.* at 1124.

42. *Id.*

43. *Id.*; see *In re Reading Co.*, 551 F. Supp. 1205, 1215-17 (E.D. Pa. 1982) (if primary

pass the test of "entire fairness" to the minority.⁴⁴ This standard necessitated an extensive inquiry by reviewing courts into the majority's purpose for the merger and a corresponding degree of judicial discretion.⁴⁵ Furthermore, under the court's broad language the restrictions of *Singer* and *Tanzer* applied to virtually all forms of mergers.⁴⁶

Cases subsequent to *Singer* and *Tanzer* closely followed the business purpose rule.⁴⁷ The inadequacy of the statutory appraisal remedy,⁴⁸ however, led the Delaware Supreme Court to expand the remedies available to wrongfully ousted minority shareholders for breach of fiduciary duty.⁴⁹ The court ruled that such shareholders could obtain an accounting, rescission, or any other equitable remedy available in other contexts for similar breaches of duty.⁵⁰ The new remedy structure proved difficult to apply, however, because the court failed to provide guidelines for the application of the equitable remedies it had made available.

III. *WEINBERGER V. UOP, INC.*

In 1974 Signal⁵¹ sold one of its subsidiaries for \$420 million in cash. Anxious to invest this surplus, Signal became interested in UOP⁵² as a

purpose is to impair minority interest, directors' acts are actionable); *The Twenty Seven Trust v. Realty Growth Investors*, 533 F. Supp. 1028, 1039 (D. Md. 1982) (fairness concepts applied to tender offer).

44. 379 A.2d at 1124 (citing *Sterling v. Mayflower Hotel Corp.*, 33 Del. Ch. 293, 93 A.2d 107 (Sup. Ct. 1952)); see *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032, 1034-35 (Del. 1979) (*Tanzer* "entire fairness test"). But see *Gabhart v. Gabhart*, 267 Ind. 370, 370 N.E.2d 345, 356 (1977) (rejecting fairness evaluation).

45. 379 A.2d at 1124-25; see also Note, *supra* note 30, at 1107-08 (court review of "entire fairness" as well as price and business purpose).

46. Note, *supra* note 30, at 1110-13. *Singer* and *Tanzer* do not differentiate between mergers that have different purposes. Corporations use mergers to acquire a target corporation, to go private, or, having gone public during prosperous periods, to buy back their shares at a discount. *Id.* at 1110. For a discussion of the shortcomings of the *Singer-Tanzer* fiduciary and business purpose standards, see Brudney, *A Note on "Going Private,"* 61 VA. L. REV. 1019, 1020-21 (1975); Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354, 1364-76 (1978).

47. See, e.g., *Susman v. Lincoln Am. Corp.*, 550 F. Supp. 442, 446 (N.D. Ill. 1982) (following lower court decision in *Weinberger v. UOP, Inc.*, 426 A.2d 1333 (Del. Ch. 1981), *rev'd*, 457 A.2d 701 (Del. 1983), which had expressly affirmed *Singer*); *Kerregin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 450 F. Supp. 639, 645 n.7 (S.D.N.Y. 1978) (corporate machinery cannot be used to injure minority shareholder without justification); *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032, 1034 (Del. 1979) (unmistakable focus of *Singer* was on fiduciary duty and protection of minority shareholders).

48. DEL. CODE ANN. tit. 8, § 262 (Supp. 1982).

49. *Lynch v. Vickers Energy Corp.*, 429 A.2d 497 (Del. 1981).

50. *Id.* at 501. Statutory appraisal is available in Delaware by petition, thereby avoiding the time and expense of litigation. DEL. CODE ANN. tit. 8, § 262 (Supp. 1982). Although the *Lynch* court recognized that a breach of fiduciary duty permits broader remedies than simple appraisal, it held that the plaintiff was only entitled to the monetary equivalent of rescission because rescission itself was "not feasible at this late date" in the litigation. 429 A.2d at 505-06.

51. Signal is a diversified publicly held corporation specializing in technical industries.

52. UOP was a diversified publicly held corporation engaged in petroleum and petrochemical services and related products, construction, fabricated metal products, and transportation equipment products.

potential acquisition. After extended negotiations between Signal and UOP, the parties agreed that Signal would purchase 1,500,000 authorized but unissued shares of UOP stock at twenty-one dollars per share, contingent on Signal's acquiring 4,300,000 publicly held shares of UOP in a cash tender offer. In total, Signal would acquire 50.5% of all UOP stock. The tender offer was approved by the board of directors of both companies in April 1975, and was greatly oversubscribed.⁵³ Signal, however, purchased only enough UOP stock to achieve its goal of 50.5% control. As majority shareholder Signal placed six directors⁵⁴ on the UOP board.⁵⁵ A year later the UOP president and chief executive officer retired and Signal placed James V. Crawford at the head of UOP.⁵⁶

After several years of unsuccessfully searching for other investment opportunities, Signal decided to investigate the profitability of acquiring complete control of UOP. Signal's board chairman, William W. Walkup, and president, Forrest N. Shumway, initiated a feasibility study that was performed by Charles S. Arledge⁵⁷ and Andrew J. Chithea,⁵⁸ employees of Signal and members of the UOP board. The Arledge-Chithea report, which was prepared using information available to its authors as UOP board members, concluded that acquisition of the UOP stock would be a good investment for Signal at a price as high as twenty-four dollars per share.⁵⁹ After a discussion of the report, Signal's executive committee⁶⁰ recommended acquiring the balance of UOP stock for twenty to twenty-one dollars per share.⁶¹ The committee, relying in part on the Arledge-Chithea report and the oversubscription of the 1975 tender offer, authorized its management to negotiate a proposal for the acquisition of the mi-

53. Immediately prior to the Signal tender offer, UOP stock was trading at less than \$14 per share on the New York Stock Exchange.

54. UOP's board had a total of 13 directors.

55. Five of Signal's appointees were directors or employees of Signal. The sixth was a long time associate of Signal.

56. Crawford was senior vice president of a wholly-owned subsidiary of Signal and was made a Signal director shortly after his appointments as UOP president, chief executive officer, and director.

57. Arledge was vice president-director of planning at Signal, as well as a member of the Signal board.

58. Chithea was senior vice president-chief financial officer at Signal, as well as a member of the Signal board.

59. Signal's return on the \$24 per share investment was calculated by Arledge and Chithea to be 15.7%. In addition to an excellent return on investment, the Arledge-Chithea report outlined numerous other advantages of the acquisition, including increased earnings, more efficient flow of resources between Signal and its subsidiaries, cost savings potential, facilitation of technological exchange among Signal's subsidiaries, and elimination of potential conflicts of interest.

60. Before the Mar. 6, 1978, Signal board meeting, Crawford and Walkup discussed the price offered the minority shareholders. Crawford, as UOP president, suggested the \$21 per share figure would be required to obtain UOP board approval.

61. Although Crawford was not a member of the Signal executive committee, he was summoned by the committee to discuss the Signal-UOP merger. Before the meeting Shumway and Walkup sought Crawford's reaction to the \$20-\$21 offer. Crawford agreed that the price was fair and voiced objections only to the effect of the merger on UOP personnel. After receiving assurances that UOP's management would not be displaced by the merger, Crawford agreed to submit the proposal to the UOP board and shareholders for approval.

nority shares.⁶² Signal issued two press releases⁶³ announcing the proposed merger and the current state of negotiations.

On March 6, 1978, the Signal and UOP boards met simultaneously by teleconference to consider the proposed merger. Walkup and Crawford attended the UOP meeting to explain the proposal and answer any questions from UOP board members. After Signal had approved the merger at twenty-one dollars per share,⁶⁴ the proposal was presented to the UOP directors for consideration and approval. The packets of information provided to the UOP directors included a copy of the proposed merger agreement, the fairness opinion rendered by Lehman Brothers Kuhn Loeb Inc., UOP financial data for 1974 through 1977, and other market and budget statistics. The Arledge-Chitica feasibility study was not included.⁶⁵ Based on the information made available to it, the UOP board voted unanimously to adopt the Signal merger proposal.⁶⁶ On March 7, 1978, UOP notified its shareholders of the UOP and Signal boards' action.⁶⁷ The notice and proxy statement mailed to the shareholders contained an endorsement of the proposed merger by the UOP board and urged shareholder support. The proxy also included a brief explanation of how the twenty-one dollar price was determined⁶⁸ and referred to the favorable opinion prepared by Lehman Brothers.⁶⁹ On May 26, 1978, the UOP shareholders' annual meeting convened. Only 51.9% of the minority shareholders voted

62. No negotiations took place. Crawford's activities as UOP president after the Signal executive committee meeting consisted of contacting UOP's outside directors to explain the status of the merger and retaining Lehman Brothers Kuhn Loeb Inc. to render a fairness opinion. As a result of the reactions of the independent board members, Crawford informed Walkup that a price offer of \$21 per share was required to obtain UOP board approval. At no time did Crawford or any other representative of UOP bargain with Signal for more than \$21 per share.

Lehman Brothers was allowed only three business days to render its opinion. As a result of its hurried, and questionably accurate, opinion Lehman Brothers was originally a party to this action. The plaintiffs, however, dropped Lehman Brothers from the suit on appeal and therefore the issues raised by its actions are not discussed in the supreme court opinion.

63. The press release of Feb. 28, 1978, specifically referred to "negotiations" between Signal and UOP. The second press release announced Signal's intent to offer between \$20 and \$21 per share and referred to the earlier statement regarding negotiations.

64. The terms of the proposal approved by Signal required that a majority of the UOP minority shares approve the merger and that at least two-thirds of all UOP shares, inclusive of Signal's shares, vote in favor of the merger.

65. Both courts found that the Arledge-Chitica report, prepared by UOP directors for the exclusive use of the Signal leadership, was never made available to the non-Signal UOP board members. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 707 (Del. 1983).

66. Only the independent board members voted on the proposal, but the minutes reflected approval of the merger by all UOP board members.

67. The letter reiterated the Feb. 28, 1978, press release announcement of negotiations between Signal and UOP.

68. The proxy stated, in part: "The price was determined after *discussions* between James V. Crawford, a director of Signal and Chief Executive Officer of UOP, and officers of Signal which took place during meetings on February 28, 1978, and in the course of several subsequent telephone conversations." *Id.* at 708 (emphasis added by court). The word "discussions" was substituted for the original word "negotiations" to avoid explaining the extent of negotiations to the Securities and Exchange Commission. *Id.*

69. Neither the short timeframe nor the manner in which the Lehman Brothers report was prepared were disclosed in the proxy statement.

for the merger,⁷⁰ but in combination with Signal's holdings the total of 76.2% surpassed the minimum two-thirds stockholder approval required under the merger proposal.

Shortly after the stockholders approved the merger, Weinberger filed a class action suit on behalf of the minority stockholders against UOP, Signal, Lehman Brothers, the board of UOP, and the board of Signal.⁷¹ The plaintiffs presented four major contentions to the Delaware Chancery Court.⁷² First, the plaintiffs alleged that Signal had breached its fiduciary duty to the minority shareholders by unfairly using its control over UOP to cash-out the minority interests without a legally proper purpose, and at a grossly inadequate price. Second, the plaintiffs charged that the defendants had misrepresented the true method by which the price had been established, both in its proxy statement and press releases, thereby nullifying the effectiveness of the merger approval vote. Third, the plaintiffs alleged that the majority had breached its duty to the minority by failing to negotiate for a higher price and by failing to take full account of the value of the UOP shares. Finally, the plaintiffs alleged that the full, fair value for the UOP shares was twenty-six dollars per share.

A comparison of the Delaware Chancery Court decision with the Delaware Supreme Court decision is a study in contrasts. The chancery court attempted to extend and to clarify the doctrines announced in the *Singer*⁷³ and *Tanzer*⁷⁴ decisions. The supreme court in *Weinberger*, demonstrating its strong dissatisfaction with the vague business purpose test it had promulgated in *Singer*, broke with precedent and strove to establish a more objective standard to evaluate the fairness of mergers.⁷⁵

70.

Shareholder	Shares	%	% of Minority
Signal	5,800,000	50.5	-
Minority for merger	2,953,812	25.7	51.9
Minority against merger	254,840	2.2	4.5
Minority not voting	2,479,650	21.6	43.6
Total	11,488,302	100.0%	100.0%

71. The original complaint failed to carry the burden of demonstrating unfairness and was dismissed. An amended complaint, alleging specific facts giving rise to fraud, misrepresentation, and misconduct was accepted, but the chancellor limited the class of plaintiffs to those shareholders who did not ratify the merger at the May 26, 1978, shareholders' meeting. The Delaware Supreme Court reversed this limitation of the plaintiffs' class and expanded the class to include all of UOP minority shareholders at the time of the merger. Weiss, *The Law of Take Out Mergers: Weinberger v. UOP, Inc. Ushers in Phase Six*, 4 CARDOZO L. REV. 245, 246 n.12 (1983).

72. *Weinberger v. UOP, Inc.*, 426 A.2d 1333, 1340-41 (Del. Ch. 1981).

73. *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977).

74. *Tanzer v. International Gen. Indus., Inc.*, 379 A.2d 1121 (Del. 1977).

75. *Weinberger* specifically overturned the business purpose requirement of *Singer* and its progeny. 457 A.2d at 704.

A. The Chancery Court Decision

The chancery court entered judgment for the defendants.⁷⁶ The vice-chancellor discussed *Singer* and its progeny at length, specifically identifying *Sterling v. Mayflower Hotel Corp.*⁷⁷ as the pillar of all later decisions in the area because *Sterling* established the majority's burden of demonstrating the "entire fairness" of the transaction.⁷⁸ This burden does not arise, however, until after minority shareholders object to the merger and present specific proof of its unfairness.⁷⁹ According to the chancery court, *Singer* extended the fairness standards established in *Sterling* to cash-out mergers such as the one involved in *Weinberger*.⁸⁰ The court thus held that a valid business purpose was a prerequisite to proving the fairness of a cash-out merger.⁸¹ In addition, the bona fide business purpose of the majority must, under *Tanzer*, extend beyond mere elimination of the minority shareholders.⁸² The court therefore read *Tanzer* as including the purpose of the merger as an element in assessing the fairness of the merger under the standards enunciated in *Sterling*.⁸³ The court found, however, that Signal had used the merger to effectuate the legitimate business purpose of high yield investment.⁸⁴

In arguing that the defendants had misrepresented the means by which the merger price had been determined, the plaintiffs contended that "complete candor" was the applicable standard for evaluating information revealed to all stockholders.⁸⁵ The court agreed that this was the

76. 426 A.2d at 1363.

77. 33 Del. Ch. 293, 93 A.2d 107 (Sup. Ct. 1952).

78. 426 A.2d at 1344.

79. *Id.* at 1345. The court cited the *Singer* line of authority as support for this proposition and erected a protective barrier for defendants by placing the initial burden on the plaintiff to make a prima facie case before forcing the defendant to prove fairness. *Id.* at 1345-46; see *David J. Greene & Co. v. Dunhill Int'l, Inc.*, 249 A.2d 427, 430 (Del. Ch. 1968) (plaintiff must show fraud or something akin to fraud); *Cole v. National Cash Credit Ass'n*, 18 Del. Ch. 47, 156 A. 183, 187 (Ch. 1931) (plaintiff must plead fraud in order to enjoin merger).

80. 426 A.2d at 1346; see *City of Coral Gables v. Weksler*, 164 So. 2d 260, 263 (Fla. Dist. Ct. App. 1964) (*Singer*-like standard applied to conflict of interest in public domain); *Southdown, Inc. v. McGinnis*, 89 Nev. 184, 510 P.2d 636, 640 (1973) (fair cash value for minority shareholders' interest); *Lucas v. Pembroke Water Co.*, 205 Va. 84, 135 S.E.2d 147, 150 (1964) (fairness is fair market value).

81. 426 A.2d at 1346; see *Crane Co. v. Harsco Corp.*, 511 F. Supp. 294, 305 (D. Del. 1981) (citing *Bennett v. Propp*, 41 Del. Ch. 14, 187 A.2d 405, 409 (Sup. Ct. 1962), and stating that where "stock purchase occurs in the context of a tender offer, the directors have an inherent conflict of interest" and the burden to justify the purchase as primarily in the corporate interest); *Perl v. IU Int'l Corp.*, 61 Hawaii 622, 607 P.2d 1036, 1045-47 (1980) (adopted business purpose test for merger evaluation). But see *Deutsch v. Blue Chip Stamps*, 116 Cal. App. 3d 18, 172 Cal. Rptr. 21, 24 (1981) (statute permitting 90% cash-out preempts *Singer* business purpose language); *Yanow v. Teal Indus., Inc.*, 178 Conn. 263, 422 A.2d 311, 320 (1979) (discussed but did not follow *Singer*'s business purpose rule); *Gabhart v. Gabhart*, 267 Ind. 370, 370 N.E.2d 345, 356 (1977) (disagreeing with *Singer*'s "entire fairness" doctrine).

82. 426 A.2d at 1346.

83. *Id.*

84. *Id.* at 1350.

85. The plaintiffs relied on *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. 1977).

appropriate standard, but concluded that the majority's representations were adequate.⁸⁶ The court found that the "discussions" between UOP and Signal were, in fact, "negotiations" and that the press releases referring to "negotiations" were therefore not misleading.⁸⁷

The court next rejected the plaintiffs' contention that the defendants had breached the fiduciary duty they owed to the minority shareholders.⁸⁸ The court focused on the status of the minority board members as experienced businessmen, the relation between market price and the price offered the minority shareholders in the merger,⁸⁹ and other factors that indicated that twenty-one dollars could be a fair price per share.⁹⁰ The court ignored the placing of Signal personnel in vital positions within the UOP organization and the intracompany negotiation that had occurred between Crawford as president of UOP and his co-directors at Signal. The court also ignored the feasibility report prepared by Signal members of the UOP board.

Finally, the court examined the valuation process used by the experts for the parties. The plaintiffs' expert, using the expanded remedies made available by the Delaware Supreme Court,⁹¹ valued the UOP stock at approximately twenty-six dollars per share.⁹² The plaintiffs contended that these expanded appraisal methods were essential to preserve the viability of suits of this type. The plaintiffs pointed out that statutory appraisal⁹³ was always available to a cashed-out minority and that broader remedies should thus be available to minority shareholders in suits for breach of fiduciary duty.⁹⁴ The court, however, questioned the validity of the plaintiffs' financial analysis and chose instead to follow the "Delaware Block" or weighted average method of valuation used by the defendants' ex-

86. 426 A.2d at 1351-53.

87. *Id.* at 1352.

88. *Id.* at 1353, 1355. The court found this argument to be the strongest aspect of the plaintiffs' case. *Id.* at 1353-56.

89. The 1975 tender offer of \$21 per share was made when UOP stock was trading at just below \$14 per share. The 1978 tender offer of \$21 per share was announced when UOP stock was trading at \$14.50 per share.

90. *Id.* at 1354-55. The court focused on certain valuation calculations that are completely divorced from the core issues of fairness and fiduciary duty. *Id.* For a general discussion of valuation, see B. MELCHER, STOCKHOLDERS' EQUITY, PART I (1973).

91. *Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 504-06 (Del. 1981); see *supra* notes 49-50 and accompanying text.

92. In reaching this figure plaintiff's expert used the discounted cash flow method of valuation and a comparative analysis that examined premium over market paid within similar timeframes for 100% mergers and acquisitions over \$100,000,000. Based on 10 comparable transactions the expert compared market price per share before the announced merger with the tender offer price. Adjusting for "noise" variables, the expert calculated premium paid, on a percentage basis, to acquire 100% control. He found the median premium to be 74%; therefore, a price to UOP minority shareholders of \$25.65 to \$27.30, based on a Feb. 28, 1978, closing price of \$14.75 per share, was necessary to achieve a premium of 70-80%.

93. DEL. CODE ANN. tit. 8, § 262 (Supp. 1982).

94. Statutory appraisal, when applied to breach of duty cases as interpreted before *Weinberger*, did not account for lost future value of the cashed-out shares, thus making breach of fiduciary duty case remedies utilizing the Delaware Block method of valuation identical to those in simple appraisal cases.

perts.⁹⁵ The court indicated that it opposed the extension of remedies⁹⁶ beyond the statutory appraisal available to stockholders.

B. The Delaware Supreme Court Decision

The Delaware Supreme Court broke sharply with precedent in reversing the chancery court decision, establishing a new standard of fiduciary duty between shareholders, and reformulating the damage measures available for a breach of that duty. Initially, the court stated that the primary issue in the case was the exclusive use of the Arledge-Chitrea feasibility study by Signal.⁹⁷ The court found that Signal's exclusive use of the report raised fiduciary duty problems because the Signal directors participated on the UOP board without full disclosure of the content of the report or of the potential conflict of interest inherent in sitting on both sides of such a transaction.⁹⁸ The court suggested that where such a conflict exists, the interests of the minority shareholders should be represented by an independent negotiator.⁹⁹

The court expanded upon the type of behavior required of majority shareholders in such a situation. The court stated that Delaware law had historically required a majority to act with "complete candor" toward minority shareholders.¹⁰⁰ Under this standard board members are not only required to refrain from conduct that would be injurious to the minority,¹⁰¹ but must also take affirmative steps, such as disclosure of germane information,¹⁰² to protect the minority. Directors who hold dual board memberships owe a fiduciary duty to both corporations and, similarly, parent corporations owe a fiduciary duty to the minority shareholders of their subsidiaries.¹⁰³ If in either case the minority shareholders are not repre-

95. 426 A.2d at 1357-62. The "Delaware Block" valuation method is a weighted average valuation using assets, market price, earnings, and other elements of value. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 712 (Del. 1983); see *In re General Realty & Utils. Corp.*, 29 Del. Ch. 480, 52 A.2d 6, 14-15 (Ch. 1947). This method yielded a price between \$19.86 and \$20.69 per share as fair to the minority shareholders.

96. 426 A.2d at 1359. The chancery court saw the plaintiffs' attempt to structure alternative remedies to statutory appraisal as illogical and against existing law. *Id.* at 1360.

97. 457 A.2d at 708. The court found overwhelming evidence that the Arledge-Chitrea feasibility study and the information regarding the profitability of the UOP acquisition was never disclosed to the independent directors of UOP. *Id.* at 708-09.

98. *Id.* at 709.

99. *Id.* at 709 n.7; see *Harriman v. E.I. du Pont de Nemours & Co.*, 411 F. Supp. 133, 154 n.117 (D. Del. 1975). The *Weinberger* court equated fairness to an independent board acting in the interests of all of the corporation's stockholders. Furthermore, in the parent-subsidary context a demonstration of arms-length bargaining is required to prove fairness. 457 A.2d at 710 n.7.

100. *Id.* at 710 (quoting *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977)); see *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 5 A.2d 503, 510 (Sup. Ct. 1939).

101. 457 A.2d at 710 (quoting *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 5 A.2d 503, 510 (Sup. Ct. 1939)). The court stated that there are no "safe harbors" for the divided loyalties exhibited by Signal. 457 A.2d at 710.

102. Germane information means that information "a reasonable shareholder would consider important in deciding whether to sell or retain stock." *Id.* at 710.

103. *Id.* (citing *Sterling v. Mayflower Hotel Corp.*, 33 Del. Ch. 293, 93 A.2d 107, 110 (Sup. Ct. 1952); *Bastian v. Bourns, Inc.*, 256 A.2d 680, 681 (Del. Ch. 1969), *aff'd*, 278 A.2d

sented by an independent negotiator, the duty of the board member or the parent corporation is to act in the best interest of both corporations.¹⁰⁴ The court reaffirmed its holding in *Gottlieb* and *Sterling* that such board members have the burden of establishing the "entire fairness" of the transaction.¹⁰⁵

The court held that there are two interrelated components of fairness: fair price and fair dealing.¹⁰⁶ Fair dealing is the requirement of complete candor¹⁰⁷ that precludes a shareholder, director, or manager with superior information from misleading shareholders not privy to that information.¹⁰⁸ The court held that Signal's exclusive use of the Arledge-Chittea study failed to meet this standard, not only because the information had been withheld from UOP, but also because Signal had obtained it through its representation on the UOP board.¹⁰⁹ The court further stated that this disparate bargaining position, coupled with the lack of any true negotiations between Signal and UOP, precluded the contention that any reasonable concept of fair dealing had been satisfied,¹¹⁰ and characterized Signal's actions instead as "wholly flawed."¹¹¹ The court concluded that an informed minority with access to the Arledge-Chittea study or information about other important aspects of the transaction might have voted differently on the merger, thus rendering the prior vote meaningless.¹¹²

Turning to the issue of fair price, the court balanced the defendants' narrow reading of the appraisal statute¹¹³ against the plaintiffs' prayer for a liberalized remedy for breach of fiduciary duty.¹¹⁴ The court conceded

467 (Del. 1970); *David J. Greene & Co. v. Dunhill Int'l Inc.*, 249 A.2d 427, 431 (Del. Ch. 1968)).

104. 457 A.2d at 711 (citing *Warshaw v. Calhoun*, 43 Del. Ch. 148, 221 A.2d 487 (Sup. Ct. 1966)).

105. 457 A.2d at 710 (citing *Sterling v. Mayflower Hotel Corp.*, 33 Del. Ch. 293, 93 A.2d 107, 110 (Sup. Ct. 1952); *Gottlieb v. Heyden Chem. Corp.*, 33 Del. Ch. 177, 91 A.2d 57, 57-58 (Sup. Ct. 1952)). The court also noted, however, that if the corporate action has been approved by an informed vote of a majority of the minority shareholders, the burden shifts to the plaintiff to show that the transaction was unfair to the minority. 457 A.2d at 703. The court found that the minority vote here had not been an informed one. *Id.*

106. *Id.* at 711.

107. *Id.* (citing *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977)).

108. 457 A.2d at 711 (citing *Lank v. Steiner*, 43 Del. Ch. 262, 224 A.2d 242, 244 (Sup. Ct. 1966)).

109. 457 A.2d at 711.

110. *Id.*; see *Tri-Continental Corp. v. Battye*, 31 Del. Ch. 523, 74 A.2d 71, 72 (Sup. Ct. 1950); Moore, *The "Interested" Director or Officer Transaction*, 4 DEL. J. CORP. L. 674, 676 (1979).

111. 457 A.2d at 712. The court also indicated that Signal had misrepresented the Lehman Brothers' fairness opinion as objective and carefully prepared, when in fact the report was hurriedly prepared by a long-time associate of Signal. *Id.* The plaintiffs dropped Lehman Brothers from the suit shortly before reargument before the supreme court. The court did not, therefore, address Lehman Brothers' duty in the transaction. *Id.* at 703 n.3.

112. *Id.* at 712; see *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977); Cahall v. Lofland, 12 Del. Ch. 299, 114 A. 224, 234 (Ch. 1921).

113. DEL. CODE ANN. tit. 8, § 262 (Supp. 1982).

114. 457 A.2d at 712; see, e.g., F. O'NEAL, "SQUEEZE OUTS" OF MINORITY SHAREHOLDERS § 7.13 (1975); Moore, *The "Interested" Director or Officer Transaction*, 4 DEL. J. CORP. L. 674 (1979); Nathan & Shapiro, *Legal Standards of Fairness of Merger Terms Under Delaware Law*, 2 DEL. J. CORP. L. 44 (1977).

that the Delaware Block method of valuation, which the chancellor had employed to appraise the value of the UOP stock, had been used for many years in Delaware, but found it "clearly outmoded" to the extent that it precluded the use of other methods of valuation.¹¹⁵ In place of the Delaware Block method of valuation, the court expanded the means of valuation to encompass "any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court."¹¹⁶ This liberalized approach permitted consideration of all relevant indices of fair value while leaving the court in control of the ultimate valuation method in individual cases.¹¹⁷

The court concluded that the legislative intent underlying the evolution of the appraisal statute supported its approach.¹¹⁸ The court noted that the current statute stresses judicial consideration of all relevant factors in determining fair value,¹¹⁹ while earlier versions of the statute had not mentioned fairness¹²⁰ or had merely alluded to it in general terms.¹²¹ Thus the *Weinberger* court's consideration of elements of future value and the nature of the enterprise¹²² were intended to fulfill the legislative goal of fully compensating cashed-out shareholders by considering a broad spectrum of stock value indices.¹²³ The court further held that the broad remedies it had established were not limited to monetary damages,¹²⁴ but also allowed rescission or any other appropriate form of equitable or monetary relief.¹²⁵

115. 457 A.2d at 712. The court declared that the standard Delaware Block or weighted average method of valuation "shall no longer exclusively control" appraisal proceedings. *Id.* at 712-13.

116. *Id.* at 713.

117. *Id.* at 712-13; *see also* *Tri-Continental Corp. v. Battye*, 31 Del. Ch. 101, 66 A.2d 910, 917-18 (Ch. 1949) (many value factors must be considered in determining fair cash-out price), *rev'd on other grounds*, 31 Del. Ch. 523, 74 A.2d 71 (Sup. Ct. 1950).

118. 457 A.2d at 713.

119. *Id.* DEL. CODE ANN. tit. 8, § 262(h) (Supp. 1982) states:

After determining the stockholders entitled to an appraisal, the Court shall appraise the shares, determining their *fair value* exclusive of any element of value arising from the accomplishment or expectation of the merger, together with a fair rate of interest, if any, to be paid upon the amount determined to be the *fair value*. In determining such fair value, the Court shall take into account *all relevant factors*.

Id. (emphasis added).

120. *See id.* § 262 (1975).

121. *See id.* (as amended 1976).

122. 457 A.2d at 713. Consideration of these factors is unique in merger law, and they were previously excluded in Delaware under the *Singer* approach. *Id.* at 713-14.

123. *Id.* at 714; *see In re* *Burton Coal Co.*, 126 F.2d 447, 448 (7th Cir. 1942) (value of securities is market value of stock in creditor claim); *Phelps v. Watson-Stillman Co.*, 365 Mo. 1124, 293 S.W.2d 429, 433 (1953) ("value" is an abstract concept representing a flexible standard for fixing value between parties, considering assets, earnings, dividends, management, and "[e]very relevant fact and circumstance which enters into the value of corporate property and which reflects the value of corporate stock").

124. 457 A.2d at 714. The court, therefore, rejected the exclusive monetary relief formula it had utilized in *Lynch* less than two years before. *Id.*; *see supra* note 50 and accompanying text.

125. 457 A.2d at 714; The court recognized that when as a result of a merger the companies' assets are so intertwined as to prevent rescission, the only practical remedy will be monetary damages. *Id.*

Finally, the *Weinberger* court addressed the business purpose rule. The court noted that the rule was a departure from prior case law¹²⁶ and observed that the rule provided little protection to minority shareholders since it could be "interpreted out of existence."¹²⁷ The court therefore eliminated the business purpose rule, relying on the total fairness concept and the expanded remedies that it had made available to guide the lower courts in the protection of minority shareholder interests in cash-out mergers.¹²⁸

IV. CONCLUSION

In *Weinberger v. UOP, Inc.* the Delaware Supreme Court restructured the methods of determining the fairness of a merger to the cashed-out minority by replacing the business purpose rule with an integrated system testing fair price and fair dealing. The dual fairness measures, fair price and fair dealing, address the central issues in a cash-out merger. Fair dealing balances the fiduciary duty of the majority stockholder against his interest in voting his shares in his own best interest. The *Singer* decision signalled increased judicial concern for the results of liberalized merger statutes.¹²⁹ The response after *Singer* was a reinstatement of every shareholder's right to receive full value for his investment. Like the *Guth* decision, *Weinberger* defines a strict fiduciary duty that requires directors to execute their duties in the best interests of their corporations. If directors are members of both parent and subsidiary corporations, they must act on each board as if that corporation's best interests were the directors' sole focus. Under the *Weinberger* decision, every shareholder has the right to expect and receive the best efforts of the members of the board of directors in the faithful conduct of the corporation's business.¹³⁰ Nevertheless, the precise nature of the fiduciary duty of majority to minority still contains gray areas to be addressed by courts in the future.

The *Weinberger* decision does not grant shareholders quasi-property rights in their participation in the ongoing corporate entity. The Delaware Supreme Court merely guarantees shareholders a fair price for cashed-out shares.¹³¹ The approach taken by the court in effect amended the Delaware Block valuation method to include the future potential profitability and value of the cashed-out stock, exclusive only of value directly related to the merger. Consequently, although cash-out mergers deprive the minority of future participation in the corporate entity, the new appraisal

126. *Id.* at 715. The business purpose rule broke from the line of cases including *Stauffer v. Standard Brands, Inc.*, 41 Del. Ch. 7, 187 A.2d 78 (Sup. Ct. 1962), and *David J. Greene & Co. v. Schenley Indus., Inc.*, 281 A.2d 30 (Del. Ch. 1971).

127. 457 A.2d at 715 (quoting Weiss, *supra* note 3, at 671 n.300). Weiss suggests that the rhetoric of *Tanzer* and *Singer* should be replaced by the straightforward entire transaction equity language of *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971). Weiss, *supra* note 3, at 671 n.300.

128. 457 A.2d at 715.

129. See *supra* notes 31-39 and accompanying text.

130. 457 A.2d at 711-12.

131. *Id.* at 712-14.

remedy gives the shareholder the return he reasonably anticipated on his investment. The broad language of the decision encourages inventive methods of proof of the true value of the shares,¹³² although the court retains ultimate control of the valuation of the cashed-out shares.¹³³ Because the new standards were presented in broad terms, future courts may apply the concepts announced in *Weinberger* to all mergers. In any event, the widespread influence of the Delaware Supreme Court will likely initiate a reevaluation of merger policies by the courts of other major commercial states.

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132. The court stated, "[w]e believe that a more liberal approach must include proof of value by *any* techniques or methods which are generally considered acceptable in the financial community" *Id.* at 713 (emphasis added).

133. *Id.*

